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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 158

THE PEOPLE OF THE STATE OF NEW YORK, EX REL. DONALD A. J. RAY,

Appellant,

vs.

WALTER B. MARTIN, AS WARDEN OF ATTICA STATE PRISON, ATTICA, NEW YORK

APPEAL FROM THE COUNTY COURT OF WYOMING COUNTY, NEW YORK

STATEMENT AS TO JURISDICTION

THOMAS J. McKENNA,
Counsel for Appellant.

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Appellee

JURISDICTIONAL STATEMENT

In compliance with Rule XII of the Rules of the Supreme Court of the United States, the applicant, Donald A. J. Ray, submits herewith, a statement showing the basis of the jurisdiction of the Supreme Court of the United States to review on appeal the final judgment of the County Court of the County of Wyoming in the State of New York, entered in this cause upon the Order and Remittitur of the Court of Appeals of the State of New York, the highest Court of that State. The decision was made by the highest Court on March 1st, 1945. The Remittitur of that Court was duly certified by the Clerk of that Court on March 2nd, 1945. Upon that Remittitur an order was granted by the County

Judge making the judgment of the Court of Appeals the Order of the County Court of the County of Wyoming on March 8th, 1945. On that same date, March 8th, 1945, the Remittitur of the Court of Appeals and the Order of the County Court, making the order of the Court of Appeals the order of the County Court, were duly entered in the Office of the Clerk of the County of Wyoming at Warsaw, New York.

Application for an order allowing an appeal to this Court was presented on May 4, 1945, to Mr. Justice Robert H. Jackson, a Justice of the Supreme Court of the United States.

On May 7, 1945, the office of the Clerk of the Supreme Court of the United States, at Washington, D. C., informed applicant that Justice Robert H. Jackson would not act upon the application as a matter of policy, until after the application for appeal had been presented to Chief Justice Irving Lehman of the Court of Appeals of the State of New York, and denied by him. In accordance with that direction, application for an Order allowing an appeal to the United States Supreme Court was, on the 14th day of May, 1945, presented to the Honorable Irving Lehman, Chief Judge of the New York State Court of Appeals, who denied said application with the following comment:

> "I am denying the application solely because I am not sure under the practice of the Supreme Court that the question here involved is whether the statute itself is invalid rather than whether a right claimed by the appellant under the Constitution, treaties and laws of the United States has been erroneously denied, and I prefer to have so doubtful a question of practice passed upon by a Justice of the Supreme Court. I may add that except for this doubt I should certainly have granted the application.
>
> (Signed) IRVING LEHMAN,
> *Chief Judge of the New York,*
> *State Court of Appeals.*"

Application for an order allowing an appeal to this Court was again presented on May 16th, 1945, to Mr. Justice Robert H. Jackson, a Justice of the Supreme Court of the United States.

Statutory Provision Sustaining Jurisdiction.

The Act of Congress of February 13, 1925, Chapter 229, Section 1, 43 Stat. 936, effective May 13, 1925, amending and reenacting Section 237(a) of the Judicial Code (U. S. Code, Annotate, Title 28, Section 344) provides:

> "A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, * * * where is drawn in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error. The writ shall have the same effect as if the judgment or decree had been rendered or passed in a court of the United States. The Supreme Court may reverse, modify, or affirm the judgment or decree of such State Court, and may, in its discretion, award execution or remand the cause to the Court from which it was removed by the writ."

The Act of Congress of April 26, 1928, Chapter 440, 45 Stat. 466, amending Section 2 of the Act of Congress of January 31, 1928, Public, numbered 10, Seventieth Congress, hereinbefore cited, provides:

> "Sec. 2. The statutes regulating the right to a writ of error, defining the relief which may be had thereon, and prescribing the mode of exercising that right and of invoking such relief, including the provisions relating to costs, supersedeas, and mandate, shall be applicable to the appeal which the preceding section substitutes for a writ of error."

The Statutes of the State, the Validity of Which Is Involved

The Statutes of the State of New York and portions thereof, the validity of which is drawn into question in this cause, are Section 71 of the Indian Law of the State of New York, and Sections 1044 and 1045-a of the Penal Law of the State of New York.

Section 71 of the Indian Law of the State of New York, as set forth in McKinney's Consolidated Laws of New York, Annotated, Book 25, insofar as applicable, provides as follows:

> "*Sec. 71. Exclusion of villages from reservations; lease of lands therein; certification of copies of leases granted by the Seneca nation of Indians and recording thereof.* Those parts of the Allegany reservation included in the villages of Vandalia, Carrollton, Great Valley, Salamanca, West Salamanca and Red House, as surveyed, located and established pursuant to an act of congress approved February nineteenth, eighteen hundred and seventy-five, have been constituted parts of the several towns within which they are located, and all the general laws of the state are extended over and apply to the same; except that this section shall not authorize the taxation of any Indian or the property of any Indian, not a citizen of the United States. Lands in such villages held under lease from the Seneca nation of Indians, and which the holders are entitled to have renewed by virtue of such act of congress, shall be for all purposes considered a freehold estate, and the right of dower and tenancy by the courtesy shall attach thereto, and such lands, upon the intestacy of the holder, shall descend the same as a freehold of inheritance. But the rights of the Indians in such leases shall descend as provided by the laws of the Seneca nation of Indians. * * *"

("This section was Indian Law of 1892, ch. 679, Sec. 71. It was amended to read as above by L. 1915, ch. 339. * * *")

Section 1044 of the Penal Law is set forth in McKinney's Consolidated Laws of New York, Annotated, Book 39, as follows:

"*Sec. 1044. Murder in first degree defined.*

The killing of a human being, unless it is excusable or justifiable, is murder in the first degree, when committed:

1. From a deliberate and premediated design to effect the death of the person killed, or of another; or,

2. By an act imminently dangerous to others, and evincing a depraved mind, regardless of human life, although without a premeditated design to effect the death of any individual; or without a design to effect death, by a person engaged in the commission of, or in an attempt to commit a felony, either upon or affecting the person killed or otherwise; or,

3. When perpetrated in committing the crime of arson in the first degree.

4. A person who willfully, by loosening, removing or displacing a rail, or by any other interference, wrecks, destroys or so injures any car, tender, locomotive or railway train, or part thereof, while moving upon any railway in this state, whether operated by steam, electricity or other motive power, as to thereby cause the death of a human being, is guilty of murder in the first degree, and punishable accordingly.

Historical Note

Section derived from Penal Code, Sec. 183, L. 1881, c. 676, as amended by L. 1882, c. 384, Sec. 1; and from Penal Code, Sec. 183-a, as added by L. 1897, c. 548, Sec. 1."

Section 1045-a of the Penal Law is set forth in McKinney's Consolidated Laws of New York, Annotated, Book 39, as follows:

> "*Sec. 1045-a. Life imprisonment for felony murder; jury may recommend.* A jury finding a person guilty of murder in the first degree, as defined by subdivision two of section ten hundred forty-four, may as a part of its verdict, recommend that the defendant be imprisoned for the term of his natural life. Upon such recommendation, the court may sentence the defendant to imprisonment for the term of his natural life. Added L. 1937, c. 67, Sec. 2, eff. March 17, 1937."

The Constitutional Provisions, Treaties and Federal Statutes Which It Is Claimed Invalidate and Nullify the State Statutes Heretofore Alluded To.

Although two treaties were made subsequent to the Treaty of 1794, involving this particular reservation, one in 1838 and another in 1842, the latter treaty provided the Treaty of 1794 should be determinative of the rights enjoyed by this particular reservation.

Reversion of this issue to this 1794 treaty is clearly set forth and explained in the review of the facts in the case of New York Indians, 5 Wall. 761 (1866) where, at page 767, the court said:

> "By the treaty of 1838 the Seneca nation on these reservations agreed to remove to the west of the Mississippi River, and, at the same time, with the consent of the United States, sold their lands to Ogden & Fellows, who held the pre-emptive right, derived from Massachusetts, and executed a conveyance of the same. The treaty provided for the removal within five years. It was proclaimed April 4, 1840. Before the expiration of the five years, difficulties arose between the grantees and the Indians, which resulted in a new treaty, 20th May, 1842, between the United States and

the Seneca nation, when it was agreed that the deed embracing these two reservations should be cancelled, and the Indians remain as before with all their original rights. The words are: 'The said nation shall continue in the occupation and enjoyment of the whole of the said two several tracts of land, called the Cattaraugus reservation and the Allegany reservation, with the same right and title in all things as they had and possessed therein immediately before the sale of said reservation.'"

The Particular Treaty involved (Vol. 7 Stat. at Large 44) Nov. 11, 1794:

Proclamation,
Jan. 21, 1795.

A TREATY BETWEEN THE UNITED STATES OF AMERICA, AND THE TRIBES OF INDIANS CALLED THE SIX NATIONS

The President of the United States having determined to hold a conference with the Six Nations of Indians, for the purpose of removing from their minds all causes of complaint, and establishing a firm and permanent friendship with them; and Timothy Pickering being appointed sole agent for that purpose; and the agent having met and conferred with the Sachems, Chiefs and Warriors of the Six Nations, in a general council: Now in order to accomplish the good design of this conference, the parties have agreed on the following articles; which, when ratified by the President, with the advice and consent of the Senate of the United States, shall be binding on them and the Six Nations.

ARTICLE I

Peace and friendship are hereby firmly established, and shall be perpetual, between the United States and the Six Nations.

ARTICLE III

The land of the Seneka nation is bounded as follows: Beginning on Lake Ontario, at the northwest corner of the land they sold to Oliver Phelps, the line runs westerly along the lake, as far as O-yong-wong-yeh Creek, at Johnson's Landing-place, about four miles eastward from the fort of Niagara; then southerly up that creek to its main fork, then straight to the main fork of Stedman's creek, which empties into the river Niagara, about fort Schlosser, and then onward, from that fork, continuing the same straight course, to that river; (this line from the mouth of O-yong-wong-yeh Creek to the river Niagara, above fort Schlosser being the eastern boundary of a strip of land, extended from the same line to Niagara river, which the Seneka nation ceded to the King of Great Britain, at a treaty held about thirty years ago, with Sir William Johnson;) then the line runs along the river Niagara to Lake Erie; then along Lake Erie to the northeast corner of a triangular piece of land which the United States conveyed to the state of Pennsylvania, as by the President's patent, dated the third day of March, 1792; then due south to the northern boundary of that state; then due east to the southwest corner of the land sold by the Seneka nation to Oliver Phelps; and then north and northerly, along Phelp's line, to the place of beginning on Lake Ontario. Now, the United States acknowledge all the land within the aforementioned boundaries, to be the property of the Seneka nation; and the United States will never claim the same, nor any of the Six Nations, or of their Indian friends residing thereon and united with them, in the free use and enjoyment thereof; but it shall remain theirs, until they choose to sell the same to the people of the United States, who have the right to purchase.

ARTICLE IV

The United States having thus described and acknowledged what lands belong to the Oneidas, Onondagas, Cayugas and Senekas, and engaged never to claim the same, nor to disturb them, or any of the Six Nations, or their Indian friends residing thereon and united with them, in the free use and enjoyment thereof: Now, the Six Nations and each of them, hereby engage that they will never claim any other lands within the boundaries of the United States; nor ever disturb the people of the United States in the free use and enjoyment thereof.

ARTICLE V

The Seneka nation, all others of the Six Nations concurring, cede to the United States the right of making a wagon road from Fort Schlosser to Lake Erie, as far south as Buffalo Creek; and the people of the United States shall have the free and undisturbed use of this road, for the purposes of traveling and transportation. And the Six Nations, and each of them, will forever allow to the people of the United States, a free passage through their lands, and the free use of the harbours, and rivers adjoining and within their respective tracts of land, for the passing and securing of vessels and boats, and liberty to land their cargoes where necessary for their safety.

ARTICLE VI

In consideration of the peace and friendship hereby established, and of the engagements entered into by the Six Nations; and because the United States desire, with humanity and kindness, to contribute to their comfortable support; and to render the peace and friendship hereby established, strong and perpetual; the United States now deliver to the

Six Nations, and the Indians of the other nations residing among and united with them, a quantity of goods of the value of ten thousand dollars. And for the same considerations, and with a view to promote the future welfare of the Six Nations, and of their Indian friends aforesaid, the United States will add the sum of Three thousand dollars to the one thousand five hundred dollars, heretofore allowed them by an article ratified by the President, on the twenty-third day of April, 1792; making in the whole, four thousand five hundred dollars; which shall be expended yearly forever, in purchasing clothing, domestic animals, implements of husbandry, and other utensils suited to their circumstances, and in compensating useful artificers, who shall reside with or near them, and be employed for their benefit. The immediate application of the whole annual allowance now stipulated, to be made by the superintendent appointed by the President for the affairs of the Six Nations, and their Indian friends aforesaid.

ARTICLE VII

Lest the firm peace and friendship now established should be interrupted by the misconduct of individuals, the United States and Six Nations agree, that for injuries done by individuals on either side, no private revenge or retaliation shall take place, but, instead thereof, complaint shall be made by the party injured, to the other: By the Six Nations or any of them, to the President of the United States, or the Superintendent by him appointed: and by the Superintendent, or other person appointed by the President, to the principal chiefs of the Six Nations, or of the nation to which the offender belongs; and such prudent measures shall then be pursued as shall be necessary to preserve our peace and friendship unbroken until the legislature (or great council) of the United States shall make other equitable provision for the purpose.

NOTE: It is clearly understood by the parties to this treaty, that the annuity stipulated in the sixth article, is to be applied to the benefit of such of the Six Nations, and of their Indian friends united with them as aforesaid, as do or shall reside within the boundaries of the United States; For the United States do not interfere with nations, tribes or families, of Indians elsewhere resident.

In Witness Whereof, the said Timothy Pickering, and the Sachems and War-chiefs of the said Six Nations, have hereto set their hands and seals.

Done at Kon-on-daigua in the State of New York, the eleventh day of November, in the Year one thousand seven hundred and ninety-four.

TIMOTHY PICKERING.

Necessary Portion of Treaty Making Treaty of 1794 Applicable. (7 Stat. at large 586.)

May 20, 1942.
Proclamation,
Aug. 26, 1942.

ARTICLES OF A TREATY

Made and concluded at Buffalo Creek, in the State of New York, on the twentieth day of May in the year one thousand eight hundred and forty-two, between the United States of America, acting herein by Ambrose Spencer their Commissioner, thereto duly authorized, on the one part, and the chiefs, headmen and warriors of the Seneca Nation of Indians, duly assembled in council, on the other part.

WHEREAS, a treaty was heretofore concluded, and made between the said United States, and the chiefs, headmen and warriors of the several tribes of New York Indians, dated the fifteenth day of January in the year one thousand eight hundred and thirty-eight which treaty having been afterwards amended, was proclaimed by the President of the

United States, on the fourth of April one thousand eight hundred and forty, to have been duly ratified.

And whereas divers questions and differences having arisen between the chiefs and headmen of the Seneca nation of Indians or some of them, and the said Thomas Ludlow Ogden and Joseph Fellows in relation to the said indenture and the rights of the parties thereto, and the provisions contained in the said indenture, and the rights of the parties thereto, and the provisions contained in the said indenture being still unexecuted, the said parties having mutually agreed to settle, compromise and finally terminate all such questions and differences on the terms and conditions hereinafter specified.

Now therefore, it is hereby mutually declared, and agreed, by and between the said parties as follows.

ARTICLE FIRST: The said Thomas Ludlow Ogden and Joseph Fellows in consideration of the release and agreements hereinafter contained, on the part of the said Seneca nation do on their part consent, covenant and agree that they the said nation (the said indenture notwithstanding) shall and may continue in the occupation and enjoyment of the whole of the said two several tracts of land, called the Cattaraugus Reservation, and the Allegany Reservation with the same right and title in all things, as they had and possessed therein immediately before the date of the said indenture, saving and reserving to the said Thomas Ludlow Ogden and Joseph Fellows the right of preemption, and all other the right and title which they then had or held in or to the said tracts of land. . . .

SECTION OF FEDERAL STATUTES DISPENSING WITH TREATIES BUT RESERVING EXISTING RIGHTS OF PRE-EXISTING TREATIES

Act of March 3, 1871.

Section 2079 Rev. Stat., Now Sec. 71 of Title 25 U. S. C.

"No Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty; but no obligation of any treaty lawfully made and ratified with any such Indian nation or tribe prior to March third, eighteen hundred and seventy-one, shall be hereby invalidated or impaired."

SUBDIVISION OF FEDERAL STATUTE PROVIDING FOR TERRITORIAL JURISDICTION OF OFFENSE AND STATUTE SETTING FORTH FACTS WHICH MAKE OFFENSE OF MURDER, FIRST DEGREE.

Section 451 of Title 18 U. S. C. insofar as applicable provides:

"(Criminal Code 272) Places and Waters applicable; on board American vessel on high seas or Great Lakes; on land under exclusive control of United States; Guano Islands. The crimes and offenses defined in this chapter shall be punished as herein prescribed."

Subdivision 3 thereof provides as follows:

"When committed within or on any lands reserved or acquired for the exclusive use of the United States, and under the exclusive jurisdiction thereof, or any place purchased or otherwise acquired by the United States by consent of the legislature of the State in which the same shall be for the erection of a fort, magazine, arsenal, dockyard, or other needful building."

Section 452 of Title 18 U. S. C. provides as follows:

"(Criminal Code, Section 273) Murder; first degree; second degree; Murder is the unlawful killing of a

human being with malice aforethought. Every murder perpetrated by poison, lying in wait, or any other kind of willful, deliberate, malicious and premeditated killing; or committed in the perpetration of, or attempt to perpetrate, any arson, rape, burglary, or robbery, or perpetrated from a premeditated design unlawfully and maliciously to effect the death of any human being other than him who is killed is murder in the first degree. Any other murder is murder in the second degree. (R. S. Sec. 5339; Mar. 4, 1909, c. 321, Sec. 273, 35 Stat. 1143.)"

STATUTE WHICH EXTENDS CRIME IN QUESTION TO CITY OF SALAMANCA

Section 217, Title 25 U. S. C. reads as follows:

"Except as to crimes the punishment of which is expressly provided for in this title, the general laws of the United States as to the punishment of crimes committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian Country. (R. S. Sec. 2145.)"

APPLICABLE PORTION OF FEDERAL ACT OF FEB. 19, 1875 BASED ON STATE'S REQUEST WHICH APPARENTLY WAS RELIED ON AS A SOURCE OF NEW YORK STATE COURT JURISDICTION. (Ch. 90, 18 Stat. L. 330.)

By subsequent Act of Congress, in 1890, the number of years such leases were to run was extended (26 Stat. 558, ch. 1132.) This subsequent act did not change applicable Section 8 of that Act which provides as follows:

"That all laws of the State of New York now in force concerning the laying out, altering, discontinuing, and repairing highways and bridges shall be in force within said villages, and may with the consent of said Seneca Nation in council, extend to, and be in force beyond said villages in said reservations, or in either of them; and

all municipal laws and regulations of said State may extend over and be in force within said villages; Provided, nevertheless, that nothing in this section shall be construed to authorize the taxation of any Indian, or the property of any Indian not a citizen of the United States." (18 Stat. L. 331.)

Date of Judgment or Decree Sought to Be Reviewed and Date upon Which Application for Order Allowing Appeal Was Presented.

The date of the judgment sought to be reviewed, as heretofore pointed out in this statement, is March 8, 1945.

The order in question dismissed a writ of habeas corpus and remanded relator to the custody of respondent as Warden of Attica State Prison.

On March 1, 1945, the Court of Appeals of the State of New York, the final and highest Court of appellate jurisdiction of that State affirmed an order of the Appellate Division, Supreme Court, Fourth Department. The Appellate Division had therefore and on the 27th day of September, 1944, affirmed an order of the County Court of the County of Wyoming made on the 11th day of April, 1944. The order of the County Court was filed in the County Clerk's Office of the County of Wyoming at Warsaw, New York, on the 22nd day of April, 1944. The order of the Appellate Division making the order of that appellate Court the order of the County Court and the remittitur of the Appellate Division was signed and filed and entered in the Office of the Clerk of the County of Wyoming on the 13th day of October, 1944.

That thereby said judgment became and is the final judgment of the highest Court of the State of New York in which a decision in this cause could be had and that the County Court of the State of New York has possession of the record in this cause.

Application for an order allowing an appeal to the United States Supreme Court having been denied by the Court of

Appeals of the State of New York, application for an order for leave to appeal to the United States Supreme Court was again presented to the Honorable Robert H. Jackson, Associate Justice of the United States Supreme Court on May 16, 1945.

Statement Showing Nature of Cause and Rulings to Bring Case Within Jurisdictional Provisions

Statement Regarding Facts

There is no dispute as to the facts. This is so notwithstanding a denial in the Attorney-General's answer to petitioner's allegation that the City of Salamanca is within the Allegany Reservation (Fols. 23, 64.) The denial in the answer, as agreed and stipulated during the argument of the motion before the County Judge, was predicated on the legal question of whether or not the Congressional Act of February 19, 1875, 18 Stat. 330, had the legal force and effect of placing the City of Salamanca beyond laws applicable to other portions of the reservation. In other words, it was conceded and stipulated that the locus of the crime was within the geographical limits of the reservation, as prescribed by the Treaty of 1794. (7 Stat. at large, 44.)

Facts

The relator was indicted by a grand jury of the County of Cattaraugus for the crime of murder in the first degree alleged to have been committed September 16, 1939 in the City of Salamanca in said county and within the geographical limits of the Allegany Reservation as prescribed by the Treaty of 1794 (7 Stat. at Large, 44).

The relator is, and the deceased was, a white man.

On the 4th day of December, 1939, he was convicted in the Supreme Court of Cattaraugus County on an indictment which charged a killing while engaged in the commission

of a robbery, Sections 1044, 1045-a of the Penal Law of the State of New York and on December 15, 1939 was sentenced to be confined in Attica State Prison for the term of his natural life.

People v. *Ray*, 172 Misc. 1004.

Direct appeal to the Court of Appeals was dismissed. 282 N. Y. 680 mem.

An application for leave to appeal to the Court of Appeals was denied.

The jurisdiction of the Supreme Court of the State of New York to try the prisoner was not challenged during the trial nor was any such question at any time raised or passed upon on any appeal from that conviction in the State courts.

Contention of Appellant

Relator-appellant, arguing for his release on a petition for writ of habeas corpus, contended that his "due process" rights, under the Fourteenth Amendment, Section 1, of the Constitution of the United States, had been violated. That amendment insofar as applicable provides:

> "* * * No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

He took the position that Section 71 of the Indian Law of the State of New York or any other statute of the State of New York or presumption of law, relied on by the courts of the State of New York to extend State jurisdiction of this offense into the Allegany Indian reservation, violated the terms of a 1794 treaty (7 Stat. at large, 44).

That treaty between the Six Nations of Indians and the Federal Government, he insisted, was of such a nature as to divest the Supreme Court of the State of New York of jurisdiction over the crime in question, when committed on the lands in question. This violation of the treaty, he urges, was repugnant to Article 1, Section 8, Clause 3 of the Federal Constitution which governs the treaty making power of the United States Government. That constitutional clause provides;

> "To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

He pointed out that any doubt that the Congressional Act of 1875 (ch. 90, 18 Stat. L. 330) had the force and effect of authorizing the New York State Legislature to make and extend its laws into the locus in quo was definitely settled in his favor when the United States Supreme Court refused to act on a decision and opinion of the United States Circuit Court of Appeals. That opinion recited that the 1875 Act, aside from permitting a leasing of lands and extending the State highway law into the reservation, "did not make the 'law' • • • statutory or decisional • • • of the State of New York applicable to the reservation." (*U. S.* v. *Forness*, D. C. N. Y. (1941), 37 F. Supp. 337, reversed C. C. A. (1942, 2nd Circuit) 126 F. 2d 1928, Certiorari denied, *City of Salamanca* v. *U. S.*, 1942, 62 S. Ct. 1293, 316 U. S. 694.)

Three Federal jurisdictional statutes of a somewhat general application, enacted subsequent to the 1794 Treaty, he maintained, were so phrased as to fall within and become part of the contemplated future Congressional legislation provided for by the latter portion of Article VII of that treaty. Those statutes are:

> Section 217 of Title 25, U. S. C., and Subdivision 3 of Section 451 of Title 18, U. S. C., and Section 452 of the same title.

He, however, emphasized the fact that, even if the Court should come to the conclusion that those three statutes did not apply, either alone or together, he was still entitled to the relief sought by force of the provisions of the treaty.

Other state and federal legislation and also state and federal court decisions were placed before the court to support and substantiate his prayer for relief.

History of Prior Habeas Corpus Proceedings and Means and Proceeding by Which Question Was Raised in State Courts.

The relator petitioned for a Writ of Habeas Corpus to the United States District Court for the Western District of New York. His petition was there denied upon an opinion of the Honorable John Knight, United States District Judge, filed July 19, 1943, upon the ground, first, that the petitioner could not invoke the jurisdiction of a Federal Court upon a writ of habeas corpus until he should have exhausted his remedies in the State Courts. Secondly, Judge Knight held that the Supreme Court of the State of New York had jurisdiction to try, convict and sentence for such an offense on the lands in question.

(*Matter of Ray*, 54 Fed. Supp. 218; Fols. 30 to 52.)

This decision was appealed to the Circuit Court of Appeals where it was affirmed on the theory of necessity of exhaustion of State remedies. Judge Jerome Frank writing the opinion of the Court held that the Federal Courts are inhibited from deciding the matter unless and until the State Courts shall have proved that they "will not or cannot do justice." Other than by means of that statement, the majority of the Court refrained from expressing any opinion upon the issue as to whether the State Court had jurisdiction, but Judge Clark concurred with opinion of the District Court Judge upon the additional and alternative

ground that the New York Supreme Court had jurisdiction (*U. S. ex rel. Ray* v. *Martin*, 141 Fed. 2d 218; Fols. 52 to 60). Following that decision, the matter was initially presented in the State courts by a writ of habeas corpus sued out before Justice Conable, County Judge of Wyoming County. Justice Conable in an opinion denied the writ (*People ex rel. Ray* v. *Martin*, 181 Misc. 985; Fols. 91 to 150).

From an order based on that decision an appeal was taken to the Supreme Court, Appellate Division, Fourth Department (Fols. 7 to 10). That Court, with opinion, affirmed the judgment or order of the County Court of Wyoming County (*People ex rel. Ray*, 268 A. D. 218; Fols. 163 to 187).

An appeal was taken to the Court of Appeals which, on March 1, 1945, affirmed the order of the Appellate Division which had previously affirmed the order of the County Court.

294 N. Y. ~~451~~ 61 (Opinion has not been published in official citators).

That the Court of Appeals directly passed upon the question involved in the appeal to this Court is to be gathered from that Court's opinion, which, with four other prior opinions, is hereto annexed. On pages ~~415~~ 65 and ~~416~~ 66 of that Opinion appears the following:

> "• • • We content ourselves with a statement of the bases for our conclusion that relator was properly indicted, tried and punished in the Supreme Court, despite the undoubted fact that the crime was committed on lands which form part of an Indian reservation. In general, our reasons for that conclusion are these: that there is no basis in any treaty, Constitution or Statute for an assertion by the Federal Government of exclusive jurisdiction over crimes committed by non-Indians against non-Indians on this reservation, that such jurisdiction has historically, by

common consent and for sound legal reasons been assumed to exist, by the federal and state courts in New York and elsewhere, that this is peculiarly so as to the reservations of the "Six Nations" in New York State, and, finally, that there is a Federal Statute making applicable to the city of Salamanca the general laws of the State of New York. • • •."

Statement Re Grounds That Question Is Substantial

The petitioner respectfully submits that the questions under the Constitution, Treaties and Statutes of the United States properly raised and actually decided by the State Courts and now sought to be presented to this Court are substantial Federal questions which as applied to the circumstances of this cause have not been previously decided by this Court contrary to petitioner's contention and that this Court has jurisdiction to review. That the questions raised under the Constitution, Treaties and Statutes of the United States are important and novel in their application to the petitioner and require analysis and exposition for their determination.

Aside from the fact that this particular case involves the deprivation of a man's liberty for life, the magnitude of this question can readily be ascertained because of the vast territory and proper legal rights of the thousands of occupants of the lands in question. The Allegany Reservation, the one in question, consists of about 30,469 acres and the Cattaraugus Reservation, the rights of which will also be determined by a decision of this question, consists of about 21,680 acres.

Hand Book of Federal Indian Law by Felix S. Cohen (page 420).

Cases Believed to Sustain Jurisdiction

(a) A U. S. Supreme Court case directly in point

In the case of *Worcester* v. *Georgia, supra,* the United States Supreme Court was called upon to decide a like question concerning lands, reserved to the Indians within the State of Georgia under a treaty similar to the one in question. In that case, involving a white man's trespass contrary to State Law, the Supreme Court held that an attempt by the State Legislature of Georgia to apply its laws to the lands set aside for those Indians, under a treaty, similar to the one in question, was repugnant to the Constitution of the United States and treaties and laws made under it.

The decision of the United States Supreme Court in that case is set forth in 6 Pet. 515 on pages 595 and 596 as follows:

> "Under the administration of the laws of Georgia, a citizen of the United States has been deprived of his liberty; and, claiming protection under the treaties and laws of the United States, he makes the question, as he has a right to make it, whether the laws of Georgia, under which he is now suffering an ignominious punishment, are not repugnant to the constitution of the United States, and the treaties and laws made under it. This repugnancy has been shown; and it remains only to say, what has before been often said by this tribunal of the local laws of many of the states in this union that, being repugnant to the constitution of the United States, and to the laws made under it, they can have no force to divest the plaintiff in error of his property or liberty."

(b) A U. S. Supreme Court case, involving the reservation in question which held the Legislature of the State of New York could not extend its laws into these lands.

The first U. S. Supreme Court case, involving the particular reservation, is the case of New York Indians, *supra*, decided in 1866. The U. S. Supreme Court in that case decided that the legislature of the State of New York could not extend its laws in this particular locality. At Page 771 of 5 Wallace's Reports, in that case, the court said:

> "It will be seen on looking into the general laws of the State imposing taxes for town and county charges, as well as into the special acts of 1840 and 1841, that the taxes are imposed upon the lands in these reservations, and it is the lands which are sold in default of payment. They are dealt with by the town and county authorities in the same way in making this assessment, and in levying the same, as other real property in these subdivisions of the State. We must say, regarding these reservations as wholly exempt from State taxation, and which, as we understand the opinion of the learned judge below, is not denied, the exercise of this authority over them is an unwarrantable interference, inconsistent with the original title of the Indians, and offensive to their tribal relations.
>
> The tax titles purporting to convey these lands to the purchaser, even with the qualification suggested that the right of occupation is not to be affected, may well embarrass the occupants and be used by unworthy persons to the disturbance of the tribe. All agree that the Indian right of occupancy creates an indefeasible title to the reservation that may extend from generation to generation, and will cease only by the dissolution of the tribe, or their consent to sell to the party possessed of the right of preemption. He is the only party that is authorized to deal with the tribe in respect to their property, and this with the consent of the government. Any other party is an intruder, and may be proceeded against under the twelfth section of the act of 30th June, 1834. * * *"

(c) A United States Supreme Court denial of certiorari from a United States Circuit Court of Appeals decision

holding that the 1875 Congressional Act extended only Highway and Bridge Laws into the locus in quo and that any other statutory or decisional law of the State of New York did not apply to this reservation.

Again in 1942 the aid of the United States Supreme Court was invoked by delinquent lessees of the lands in question to set aside a decision based on an opinion of the United States Circuit Court of Appeals in this Circuit (*U. S.* v. *Forness*, 125 Fed. 2d 1928) wherein that Court, at page 932, said "We conclude, then, that the statute did not make the 'law'—Statutory or decisional—of the State of New York applicable to the reservation." In that case, the United States Supreme Court denied Certiorari. (*City of Salamanca* v. *U. S.*, 1942, 62 S. Ct. 1293, 316 U. S. 694.)

The opinion of the Circuit Court of Appeals in the *Forness* case, *supra*, before reaching the above quoted conclusion, at page 932 of 125 Fed. Rep. 2d, pointed out the following as a basis for the unanimous determination of that Court:

> "* * * (2, 3) Appellees argue that this suit, brought by the United States on behalf of the Seneca Nation to enforce the cancellation, is in effect an action of ejectment, and that the action is barred by Sections 997-999 of the New York Civil Practice Act, which provide that upon a tender of the arrears of rent before judgment, the court shall dismiss the complaint. But state law cannot be invoked to limit the rights in lands granted by the United States to the Indians, because, as the court below recognized, state law does not apply to the Indians except so far as the United States has given its consent.
>
> Worcester v. Georgia, 6 Pet. 515, 560, 8 L. Ed. 483; Patterson v. Seneca Nation, 245 N. Y. 433, 156 N. E. 734; Mulkins vs. Snow, 232 N. Y. 47, 51, 133 N. E. 123; cf. The New York Indians, 5 Wall, 761, 18 L. Ed. 708. But, it is argued, such consent to the application of state law was granted by Congress, by the Act of Feb-

ruary 19, 1875, which authorized this lease and permitted the laying out of villages on the Cattaraugus and Allegany reservations of the Seneca Nation. Section 8 of that Act provided * * * (B. p. 50:

(4-6) Appellees assert, and correctly, that the words 'Municipal laws' often are used to refer to the laws of a country dealing with intra-mural matters as distinguished from 'international laws' dealing with its extra-mural affairs. Appellees then go on to insist that the symbol 'municipal laws' has only that single referent, regardless of context. Such an argument involves the 'one-word-one-meaning' fallacy. Similar reasoning would compel the conclusion that a clothes-horse is an animal of the equine species, and make it impossible to speak of drinking a toast. When, as in the statute, the 'laws' of a state of the Union are under discussion, there can be no intelligent reference to its international or extra-mural laws, for it has none under our Federal Constitution. Appellees' construction would, in effect, read the word 'municipal' out of the statute. 'Municipal laws' of such a state can have but one referent, i. e., the laws of its municipalities. The meaning is the same as when we speak of the 'Municipal Building' of the City of New York. When confronted, as we are here, with a word having two meanings, we should, of course, not select that meaning which gives it the least possible sense in the context in which it is used. In addition to the objection just indicated to appellees' construction, we can find no reason for the specific mention in the statute of state highway and bridge laws, if, as appellees contend, all state laws are comprehended in the generic term 'municipal laws.' We conclude, then, that the statute did not make the 'law'—statutory or decisional—of the State of New York applicable to the reservation. The provisions of the New York Civil Practice Act, therefore, do not bar the result asked by the Indians."

Nullified by virtue of this decision, said Section 71 of the State Indian Law, when relied on as a basis for state

jurisdiction for relator's incarceration, violated appellant's right of "due process" under Amendment 14, Section 1 of the Constitution of the United States.

Relator's federal constitutional right of "due process" was violated because said Section 71 of the State Indian Law, or any other statute of the State of New York, dependent thereon, or otherwise, for state jurisdiction of the offense in question on the place in question by the party in question, was repugnant to the Federal Constitution and treaties and laws made under it. The significance of the United States Supreme Court's action in denying a writ of certiorari should not be overlooked.

Petitioner respectfully submits that this case presents a judgment or decree in a suit in the highest court of the State of New York in which a decision in the suit could be had and that there is drawn in question the validity of the New York State Statutes on the ground that said statutes are repugnant to the Constitution, Treaties and Laws of the United States and that the decision in the State Court is in favor of the validity of the State statutes.

The quoted portions of the jurisdictional statutes heretofore outlined in this jurisdictional statement clearly show this to be a proper case of an appeal to the United States Supreme Court.

That petitioner must now appeal to the Court of Appeals is to be evidenced from a reading of the following from Ex Parte Hawk, 321 U. S. 14 (October Term, 1943) wherein, at page 116 this Court said:

> "Ordinarily an application for habeas corpus by one detained under a state court judgment of conviction for crime will be entertained by a federal court only after all state remedies available, including all appellate remedies in the state courts and in this Court by appeal or writ of certiorari, have been exhausted. Tinsley v.

Anderson, 171 U. S. 101, 104; Urquhart v. Brown, 205 U. S. 179; United States ex rel. Kennedy v. Tyler, 269 U. S. 13; Mooney v. Holohan, supra, 115; Ex Parte Abernathy, 320 U. S. 219."

The necessity of appeal to this Court is further emphasized in the case of *U. S. ex rel. Rogalski* v. *Jackson, which* was decided by the Circuit Court of Appeals, Second Circuit, on November 20, 1944 and is cited as 146 Fed. 2nd, 251.

In the Federal Supps. Advance Sheets of February 14, 1945, at pages 252, 253, of that citation, appears the following:

"After these numerous unsuccessful attempts to have his conviction set aside, Rogalski began the present proceeding to obatin a writ of habeas corpus from the United States District Court for the Northern District of New York. His petition alleged that his conviction was predicated solely on his presence in the automobile in which the two revolvers were found and the presumption contained in Section 1898-a, supra, that he was thereby guilty of illegal possession thereof. He contended that Section 1898-a was an unconstitutional provision in that it compelled him to rebut the presumption of innocence afforded to every accused person and that his conviction was therefore unlawful. Judge Brennan denied the application for the writ on the ground that the relator had not exhausted the right to appeal to the Supreme Court of the United States from the judgment of conviction. D. C. 58 F. Supp. 218. The per curiam opinion of the Supreme Court in Ex parte Hawk, 321 U. S. 114, 64 S. Ct. 448, 450, was cited in which it was stated that: 'Ordinarily an application for habeas corpus by one detained under a state court judgment or conviction for crime will be entertained by a federal court only after all state remedies available, including all appellate remedies in the state courts and in this Court by appeal or writ of certiorari, have been exhausted.'

(1) From Judge Brennan's order denying the writ, Rogalski has appealed. We think the order was right and should be affirmed.

The question was properly raised in the State Court, (*People ex rel. Carr* v. *Martin*, 286 N. Y. 27, 31, 32).

In view of the foregoing it is respectfully submitted that this Honorable Court has jurisdiction of the appeal.

DONALD A. J. RAY,
Appellant,
By THOMAS J. MCKENNA,
Counsel.

APPENDIX "A"

Opinion of the United States District Court, Western District of New York

54 Fed. Sup. 218.

KNIGHT, District Judge:

Petitioner, a white man, on December 4, 1939, in the Supreme Court, Cattaraugus County, New York, was convicted and sentenced to life imprisonment for murder of a white man, in the City of Salamanca, Cattaraugus County, New York. The locus of the murder lies within the Allegany Indian Reservation; all the lands within the City of Salamanca being leased from the Seneca Nation of Indians. The conviction aforesaid was affirmed in the Appellate Division of the Supreme Court of New York and leave to appeal to the Court of Appeals of that state denied. In none of the proceeding had the question of jurisdiction been raised until the present. Petitioner, applying for a writ of habeas corpus, contends the courts of New York State have no jurisdiction of the offense charged within the City of Salamanca. The county and state, with the United States concurring, seek a denial of the writ on several grounds. It is asserted that the application here is prematurely made, because the petitioner has not exhausted his remedies in the state court. It does appear that no application for writ has been made in the state courts. It has repeatedly been held that one must avail himself of the remedies in the state courts before he can seek relief through habeas corpus in this court. The rule is distinctly stated in Jones v. Dowd, 128 F. (2d) 331, 334, wherein the court said:

> "A litigant in a State court is not at liberty to set in motion the jurisdiction of the Federal court by a petition for a writ of habeas corpus charging the State court has denied him due process under the Fourteenth Amendment, until the State has been given a chance to make its record under this same writ. The orderly administration of justice demands it."

To the same effect, see also: Mooney v. Holshan, 294 U. S. 103, 115, Stonefield v. Buchanan, 124 F. (2d) 23.

There is a further rule relating to the writ of habeas corpus in situations such as presented herein. It is distinctly stated in U. S. ex rel. Lesser v. Hunt, 117 F. (2d) 30, 31, which arose in this District, as follows:

> "As we have several times said, intervention by lower federal courts in such cases is justified only in the rarest instances; that is, only when the state courts will not, or cannot, do justice, * * * his remedy, if he had any, was only by application to the Supreme Court of the United States by certiorari."

The rule of comity requiring further proceedings to be taken before the United States Supreme Court, where a prisoner has been convicted in state courts and pursued his remedies of appeal therein, is also followed in other Circuits. See Johnson v. Wilson, 131 F. (2d) 1; Kramer v. Nevada, 112 F. (2d) 417; Jones v. Dowd, 128 F. (2d) 331; U. S. ex rel. Parker v. Carey, 135 F. (2d) 205.

Petitioner contends that exceptional circumstances are presented herein which should lead the court to exercise its discretion to issue the writ, citing in support thereof Bowen v. Johnson, 306 U. S. 19. An inspection of that case does not reveal any question of conflicting review by a federal court of a state court system, and I do not believe the language of the opinion should be so extended. It seems to me that any discretion in the court should be exercised in favor of the state. U. S. ex rel. Parker v. Carey, supra.

In view of the foregoing, I am of the opinion that the petition is insufficient in law and that the petitioner has chosen the wrong forum for relief, if he is entitled to any.

If I am in error in the above conclusion, it seems to me that the motion must be denied for another reason.

Originally New York and Massachusetts claimed sovereignty over the land in question, each under a crown grant from England. The dispute was settled in 1786 from Massachusetts ceding sovereignty to New York. The United States Constitution was adopted in 1787 taking away the power of the states of negotiating treaties in the constitutional sense and in due course of time treaties with the

Indians required the concurrence and approval of the national government. In 1871 by Act of March 3, 1871, (Sec. 2079 Rev. Stat.) the course of dealing with the Indians by treaty was abolished and in place therefor was substituted congressional action.

Under the Constitution there is no literal phrasing giving Congress the power of sovereignty in derogation of state sovereignty over the Indians. However, this has always been an implied power, and the Indian has been referred to as the ward of the nation, U. S. v. Kagama, 118 U. S. 375, U. S. v. National Gypsum Co., 40 F. Supp. 206, 210, and this power has extended to cover both the Indian and the reservation. Under the Constitution it is thus evident that the states have lost exclusive sovereignty over the Indians, and the question is presented to this court whether or not New York State has been relieved of its sovereignty in this case, the answer depending upon whether or not Congress has evinced any intent in the premises. If Congress has legislated to prescribe exclusive federal jurisdiction over the crime involved herein, the state law must bow thereto. U. S. v. National Gypsum Co., supra; U. S. v. National Gypsum Co., supra; U. S. v. Forness, 125 F. (2d) 928, 932.

Petitioner contends that Section 217 U. S. C. A., Title 25, extends the general laws of the United States to the Allegany Reservation and as a corollary thereto extends U. S. C., Title 18, Sec. 451, sub. sec. 3 and sec. 452, the former prescribing exclusive jurisdiction in the United States over crimes defined in the Chapter which includes the latter, or Section 452, defining murder and which includes the acts involved herein—homicide in the perpetration of a robbery. The crux of petitioner's contention lies in the interpretation of Section 217, Title 25 U. S. C. The language of that section is as follows:

> "Except as to crimes the punishment of which is expressly provided for in this title, the general laws of the United States as to the punishment of any crimes committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian Country."

Does the language above quoted "Indian Country" include the City of Salamanca? An examination of Title 25, Chapt. 6, Sec. 211 and 266, shows that the phrase "Indian Country" is used therein innumerable times. Although ordinarily it would be presumed that the meaning of this phrase would be the same in each instance, this construction would yield if an inspection shows that different meanings were intended in the various uses. Section 219 prescribes requirements for the "Indian Country"; Section 220 authorizes removal of certain persons from the "Indian Country"; while Section 222 authorizes removal from "any tribal reservation"; Section 242 specifically defines Osage County, Oklahoma, as "Indian Country", but only within statutes prescribing the sale of intoxicants. Section 1 of the Act of 1834 defined "Indian Country" as land west of the Mississippi with certain exceptions. From the foregoing it is evident that the term "Indian Country" has been used in various meanings by Congress, and it is necessary to examine the particular section and circumstances to determine the meaning intended.

It is said that the term "Indian Country" embraces all land within the United States to which the Indian title has never been extinguished. Ex parte Crow Dog, 109 U. S. 556. In U. S. v. Leathers, 26 F. Cas. 16, 581, pp. 897, 899, it is stated:

> "From the earliest period of our history the boundaries of the Indian country have been narrowing. * * * The policy has been to separate the Indian tribes from the rest of the people, and to set apart for their exclusive use specific portions of the public domain. The statutes cited show that 'Indian Country' is the term used generally to describe country in the occupation of the Indians, to which their title or right of occupancy * * * has not been extinguished. * * *."

No cases are cited by or on behalf of petitioner which apply Section 217, Title 25, and Section 542, Title 18, to a similar set of facts as are herein presented.

Objectively it appears that there are six to eight Indian families residing in the City of Salamanca having a total population of about 9000. During the last 40 years several

murder cases have been prosecuted to conviction in the state courts as have generally all felonies where Indians have not been involved. Under the Act of Feb. 19, 1875, 18 Stat. 330, the municipal laws and regulations of New York were extended over the leased property and since incorporation as a city in 1913, all petty crimes, Indian or otherwise, have been prosecuted in its City Court. The United States Attorney appearing herein has presented the administrative view that New York State has jurisdiction, citing U. S. v. McBratney, 104 U. S. 621, and Draper v. United States, 164 U. S. 240. The administrative view and the de facto jurisdiction assumed by the New York courts, while not controlling on this decision, should be accorded great weight, having existed a long period of time without any congressional change. See: U. S. v. American Trucking Assns., 310 U. S. 534.

In view of the foregoing, I hold that Congress has not prescribed exclusive federal jurisdiction over the acts herein for which petitioner has been convicted, and I conclude that New York State law controls unless and until Congress passes legislation superseding it.

Petitioner contends that the rule of U. S. v. Forness, 125 F. (2d) 928, is determinative here. The decision in that case was that Congress having enacted laws with respect to Indian leases in Salamanca, New York State law with respect to leases was superseded. Such is the holding of the Second Circuit, and this opinion is not in conflict therewith. My holding is that Title 25, Sec. 217, U. S. C., does not extend the general criminal laws over the City of Salamanca.

As a result, the state law of New York applies, and the courts of that state correctly and properly assumed jurisdiction in the judgment and sentence of petitioner, and I hold that the motion and petition for the writ of habeas corpus must be denied.

In view of the foregoing, it is unnecessary to decide whether or not petitioner, by failing to raise the question of jurisdiction in the prior proceedings, has waived his right to do so now.

July 12, 1943.

JOHN KNIGHT,
United States District Judge.

Filed: July 19, 1943.

APPENDIX "B"

Opinion of the Circuit Court of Appeals, Second Circuit

141 Fed. 2nd 218.

FRANK, Circuit Judge:

Relator-appellant was convicted and sentenced in the Supreme Court of Cattaraugus County, New York, to life imprisonment for murder of a man, in the City of Salamanca, New York, which lies within the Allegany Indian Reservation, all the land within the City of Salamanca being leased from the Seneca Nation. Relator-appellant is not an Indian, nor was the murdered man. The conviction was affirmed in the Appellate Division of the New York Supreme Court; leave to appeal to the Court of Appeals of that State was denied. In the proceedings in the State Court, relator-appellant did not raise the question of jurisdiction. He made no application for a writ of habeas corpus in the State Court, but applied for such a writ in the court below. Relying largely on our decision in United States v. Forness, 125 F. (2d) 928, he asserted that, under the federal statutes and treaties with the Seneca Nation, the State court had no jurisdiction whatsoever of a trial for murder occurring in Salamanca. The court below made an order denying the application for the writ. From that order relator appellant appeals.

We agree with the contention made by the State of New York, through its Attorney General, and by respondent, that the application for a writ to a federal court was prematurely made. Save in most exceptional circumstances, the writ will not issue if the relief sought is from the judgment of a State Court where the petitioner has not exhausted his remedies in the State Court and has not shown that the State court will not, or cannot, do justice.[1] There is no

[1] Ex parte Abermathy et al., 64 S. Ct. 13; United States ex rel. Kennedy v. Tyler, 269 U. S. 13, 17; Mooney v. Holohan, 294 U. S. 103, 115; Urquhart v. Brown, 205 U. S. 179; ex parte Royall, 117 U. S. 241; Davis v. Burke, 179 U. S. 399, 403; New York v. Eno, 155 U. S. 89; United States ex rel. Lesser v. Hunt, 117 F. (2) 30, 31 (C. C. A. 2); United

showing whatever here that justice will be denied in the State Court, and none of the exceptional circumstances, noted in the cases cited, here exist.

Affirmed.

CLARK, Circuit Judge (concurring):

I concur in the decision herein on the ground stated in the opinion, as well as upon the additional and alternative ground also relied upon by the District Court, July 19, 1943, F. Supp.

APPENDIX "C"

Opinion of County Judge Denying Writ

(181 Misc. 985)

The relator was indicted by a grand jury of the County of Cattaraugus for the crime of murder in the first degree alleged to have been committed September 16, 1939, in the City of Salamanca in said County. He was convicted upon the second count of the indictment which charged a killing by the relator while engaged in the commission of a robbery. Upon this conviction he is now confined in the Attica State Prison for life. The relator is, and the deceased was, a white man. The relator now claims in this proceeding that this imprisonment is illegal, that the judgment of conviction is void, that the crime was not cognizable by the laws of the

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States ex rel. Murphy v. Murphy, 108 F. (2d) 861, 862, (C. C. A. 2); Hawk v. Olson, 130 F. (2) 910 (C. C. A. 8, Cert. den. 317 U. S. 697); Jones v. Dowd, 128 F. (2d) 331 (C. C. A. 7); Sanderlin v. Smith, 138 F. (2d) 729 (C. C. A. 4); Johnson v. Wilson, 131 F. (2d) 1 (C. C. A. 5); Stonefield v. Buchanan, 124 F. (2d) 23 (C. C. A. 6).

The circumstances justifying the issuance of a writ in such cases must be far more exceptional than those which would justify the issuance of the writ where the relief is sought from the judgment of a federal court. See, e.g. In re Lincoln, 202 U. S. 178, 182; New York v. Eno, 155 U. S. 89-96-98 (explaining In re Loney, 134 U. S. 317); Sanderlin v. Smith, 138 F. (2d) 729, 731 (C. C. A. 4). Accordingly, cases like Bowen v. Johnson, 306 U. S. 19 are not pertinent here.

State of New York but was solely within the jurisdiction of the Federal Courts. An appeal from the judgment of conviction was taken to the Appellate Division of the Supreme Court where it was affirmed. Leave to appeal to the Court of Appeals has been denied. Neither upon the trial nor in the appellate courts was any question of jurisdiction raised.

The locus of the crime has never been in dispute. The question of jurisdiction is purely a legal one based upon facts undisputed in the record.

The relator petitioned for a writ of habeas corpus to the United States District Court for the Western District of New York. His petition was there denied upon an opinion of Honorable John Knight, United States District Judge, filed July 19, 1943, upon the ground, first, that the petitioner could not invoke the jurisdiction of a Federal Court upon a writ of habeas corpus until he should have exhausted his remedies in the State Court, citing Jones vs. Dowd, 128 F. 2nd 331, and Mooney vs. Holohan, 294 U. S. 103. Secondly Judge Knight held that the penal laws of the State of New York governed the acts for which this relator was convicted and that the Supreme Court of the State of New York had jurisdiction to try and convict.

This decision was appealed to the Circuit Court of Appeals where it was affirmed, Judge Jerome Frank writing the opinion of the Court, upon the sole ground that the application was made prematurely since the petitioner had not exhausted his remedies in the State courts. The majority of the court refrained from expressing any opinion upon the issue as to whether the State Court had jurisdiction, but Judge Clark in an opinion concurred upon the additional and alternative ground that the New York Supreme Court had jurisdiction.

We have here a question which ultimately must be passed upon by the Federal Courts. The statutes we are asked to construe are Federal statutes. Nearly all the authorities cited are decisions of Federal Court, but those Courts seem to be inhibited from deciding the matter unless and until the State courts shall have proven that they "will not or cannot do justice." The result is that the question is presented initially to this Court.

In attempting to decide the issue before us we are indebted and accord great weight to the opinions expressed by United States District Judge Knight and Judge Clark of the United States Circuit Court of Appeals. The briefs furnished us by the respective counsel are most interesting as examples of research and learning along lines both legal and historical.

The question which we are to attempt to decide, as had been indicated, is whether the penal laws of the State of New York as to a non-Indian charged with murder of another non-Indian, within the confines of the City of Salamanca apply, or whether such a crime is solely within the purview of Federal law.

CHAPTER 11 OF TITLE 18 OF THE U. S. CODE provides a complete system of penal statutes as applying to (Sect. 451, sub. 3):

> "lands reserved or acquired for the exclusive use of the United States, and under the exclusive jurisdiction thereof or any place purchased or otherwise acquired by the United States by consent of the legislature of the state in which the same shall be, for the erection of a fort, magazine, arsenal, dockyard or other needful building."

Section 468 adopts by reference the definitions of and punishments for acts not made penal by any act of Congress but defined and punished by the laws of the State in which such lands are located. Such acts in such territory are, nevertheless, crimes under Federal law and ordinarily to be prosecuted in Federal Courts.

> Puerto Rico vs. Shell Co., 302 U. S. 263-P. 266, citing U. S. v. Press Publish. Co., 219 U. S. 1, Franklin vs. U. S. 216 U. S. 559.

Section 452 specifically defines as murder the acts of which this relator was convicted. It is not seriously contended that the City of Salamanca explicitly comes within this or the other subdivisions of said section.

Chapter 6 of Title 25, U. S. Code (the section of the Code relating to Indians) defines and prescribes the punish-

ment for certain crimes committed by white men and by Indians within the Indian country under certain conditions.

Section 217 of said Chapter provides as follows:

> "Except as to the crimes the punishment of which is expressly provided for in this Title, the general laws of the United States as to the punishment of crimes committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian Country."

The serious contention made by the relator here is that this section, 217, extends the provisions of Section 452 of Chapter 11 of Title 18 of the Criminal Code to a murder committed by one white man upon another within the City of Salamanca and that the City is "Indian country" under the meaning of said Section 217. In claiming that the New York Supreme Court lacks jurisdiction he seems to rely upon certain language in the case of ex parte Crow Dog, 109 U. S. 556, and similar cases, to the effect that all of the lands in the United States to which the Indian titles have not been extinguished are "Indian lands." He relies particularly upon certain extracts from the opinion of Judge Jerome Frank in United States vs. Forness, 125 Fed. 2nd 928.

THE FEDERAL CONSTITUTION, ARTICLE I, SECTION 8, CLAUSE 3, gives the Congress power

> "to regulate commerce with foreign nations, among the states, and with the Indian tribes."

To an increasing extent both the tribes and the individuals within the tribes have been regarded as the wards of the Federal Government. The power of Congress has been implied to extend as to Indians, to crimes committed by them and against them and also to their dealings with non-Indians, whether within the Eastern States where title was originally in the states or in the Western states where title was originally in the United States.

See People ex rel. Cusick vs. Daley, 212 N. Y. 183;
People ex parte Crow Dog vs. The U. S. 109 U. S. 556;
U. S. vs. Kagama, 118 U. S. 375.

See also U. S. vs. McBratney, 104 U. S. 621 and Draper vs. U. S., 164 U. S. 240.

As illustrating the extent to which the Federal Government may impose its authority for the benefit of its wards, the Indian title has been extinguished, reference is made to the case of Browning vs. U. S., 6 Fed. 2nd 801; certiorari denied, 46 U. S. Supreme Court 25.

It seems clear that if the Congress has intended that the criminal laws of the United States shall extend over non-Indians in the City of Salamanca, its intention must prevail. From the spirit of statute and decisional law such extension would seem to be based less upon whether the title of the Indians to the territory involved may or may not have been completely extinguished, than whether the interests and welfare of the Indians as wards of the United States are involved.

It is argued that under the language of Ex Parte Crow Dog, cited above, and other cases, the term "Indian Country" as used in said statute applies to the Seneca Reservation, but the question to be decided here is more strictly limited.

If by the enactment of the Act of Congress of February 19, 1875, C. 90, 18 Statutes at Large 330, the Congress intended to permit extension to the villages therein provided for, of the criminal laws of the State of New York, and to remove such villages from the category of "Indian Country" then, for that purpose, said Section 217 and Chapter 11 of Title 18 of the U. S. Criminal Code do not apply to non-Indians within the City of Salamanca.

Said Act of 1875 is set forth in the annotations to Section 71 of the Indian Law in McKinney's Consolidated Laws of the State of New York.

It is evident that following the passage of this Act the surveys provided for were made, defining the limits of the villages, including Salamanca. Leases of a large part of the territory for twelve years, were negotiated in 1880. Chapter 188 of the Laws of 1881 of the State of New York, now Section 71 of the New York State Indian Law, was passed. Later, the Congress by the Act of September 30, 1890, enacted that the leases might be renewed for a further term

of ninety-nine years subject to all of the other terms and conditions of said Act of 1875. While this did not completely extinguish the Indian titles, it did seem to provide for non-Indian occupancy and control, probably permanent. The City of Salamanca was organized in 1913 and now substantially all of the land in the City is occupied under said ninety-nine year leases, by non-Indians. The New York Legislature passing said Section 188 of the Laws of 1881 referred to the Act of Congress of 1875, adopted much of the language of that Act but provided that

> "all of the general laws of the state are extended over and apply to the same," (said villages).

Evidently this was the contemporaneous understanding of the New York Legislature as to the effect of the Act of Congress. The Supreme Court of the State of New York, the County Court of the County of Cattaraugus, the Justices of the Peace of the Town in which the former Village of Salamanca was located, and since the establishment of the City, the City Court, have all exercised criminal jurisdiction over non-Indians within the City of Salamanca. Over the past period of upwards of sixty years their jurisdiction seems not previously to have been questioned.

The case of Ex Parte Crow Dog, supra, is not an authority here; that case involved the murder of an Indian by another Indian on a reservation. The case of United States vs. Forness was a suit brought to enforce cancellation of certain leases made by the Seneca Nation upon lands in the City of Salamanca where the lessees had persistently defaulted in paying the rentals. The issue decided by the case is that such controversies between the Indians, who are the peculiar wards of the Federal Government, and lessees of lands in the City leased pursuant to the Act of Congress, are subject to the Federal laws and not to the laws of the State of New York. The crux of the decision is in the words,

> "but state law cannot be invoked to limit the rights in lands granted by the United States to the Indians * * * State law does not apply to the Indians except so far as the United States has given its consent."

There are certain statements in Judge Frank's opinion which the relator believes are favorable to his contention. These we will refer to later. We believe them to be obiter dicta. In the case before us, the murder of a white man by another white man in a city of white men, no consideration particularly affecting the interests or welfare of the Indians is involved. The sole question is whether the white inhabitants of the City of Salamanca are subject to the State or Federal criminal law and within the jurisdiction of the State or Federal courts. The question seems finally to be determined by the interpretation to be put upon the phrase,

> "and all municipal laws and regulations of said State may extend over and be in force within said villages:".

In interpreting this phrase it seems necessary, at the risk of seeming tedious, to analyze the spirit and purposes of said Act of Congress of 1875.

Section 1 of the Act, validated leases formerly made to railroad companies. These leases we understand had been made by supposed authority of State statutes but had been held unauthorized.

> See Buffalo Railway vs. Lavery, 75 Hun. 396;
> Ryan vs. Knorr, 19 Hun. 540.

Here the State had attempted ineffectively to legislate concerning relations between white men and Indians.

> But see New York Ex Rel. Cutler vs. Dibble, 62 U. S. 149, and
> U. S. Ex Rel. Kennedy vs. Tyler, 269 U. S. 13.

Section 2 authorized the appointment of commissioners to locate proper boundaries for Salamanca and other villages including as far as practicable

> "all lands now occupied by white settlers and such other lands as in their opinion may be reasonably required for the purposes of such villages."

The villages, then, were to be villages of white men and not Indians.

Section 3, in general provided for the making of twelve year leases (later legislation providing for 99 year leases)

to be perpetually renewed as provided in the Section by arbitration between the non-Indian lessees and the Indians as lessors.

Section 4 authorized the Seneca Nation to lease lands not belonging to individual Indians, to make such leases as might be authorized by the resolution of its councilors in accordance with the laws and system of government of the Seneca Nation.

Section 5, provided for recording of the leases in the Office of the Clerk of Cattaraugus County and made them subject to the recording laws of the State of New York. It provided that the rights of the lessees (non-Indians) should pass by assignment, will, descent or otherwise as provided by the laws of the State of New York but that the rights of the Indians in such leases should descend as provided by the laws of the Seneca Nation. This section appropriately makes matters of concern to non-Indians subject to white men's law and matters of concern to Indians only, subject to Indian law. Potential conflicts between Indian lessors and the lessees involving forfeiture of leases and the like, are, since the Indians have a degree of sovereignty and are the wards of the Federal Government, extra-mural matters so far as the laws of the State of New York are concerned. Such matters are subject to the laws of the United States.

Matter of Forness, 125 Fed. 2nd 928.

Section 7 of the statute attempts to give jurisdiction both to the courts of the State of New York and to the U. S. Courts, probably as a matter of convenience, as to actions for rents, recovery of real property etc. within the villages. This Section is not inharmonious with the spirit of the whole statute as we interpret it. It perhaps was not then understood that, on account of the Federal guardianship of the Indians, a special body of law might develop as to leases made with them, and their enforcement, other than that prevailing generally in the locality where the lands were situated. The Congress could not have anticipated the Forness case, which pioneered the law in this regard some sixty-five years later.

Section 8 recognizes that highways extending through the villages and to other parts of the reservation are mat-

ters of concern both to the inhabitants of the village and to the Indians on the reservation outside the village. It provides that all the laws of the State of New York concerning highways and bridges shall apply within the villages and, with the consent of the Seneca Nation and Council, may extend to and be "in force beyond said villages in said reservation or in either of them."

Hereafter occurs the phrase we have quoted above:

> "; and all municipal laws and regulations of said state may extend over and be in force within said villages; provided nevertheless that nothing in this section shall be construed to authorize the taxation of any Indian or the property of any Indian not a citizen of the United States."

In determining the meaning of the phrase "all municipal laws and regulations of said state," we are permitted to and should consider the purpose and spirit of the entire act in which it occurs. We should ascribe to it a meaning in harmony with its context, not the meaning which gives it "the least possible sense" in that context.

The learned Assistant Attorney-General in his brief points out that in early texts, more generally read in 1875 than now, the term "municipal law" was often used as referring not merely to the laws relating to municipal corporations but to the laws generally of a state or nation applying to its internal affairs, contra-distinctive to international law or laws having to do with extra-mural matters or relationships. He cites Blackstone's Commentaries with notes by T. M. Cooley, 2nd ed., Chicago, 1872, Book 1, Sec. 2, Page 43, as follows:

> "Thus much I though necessary to premise concerning the law of nature, the revealed law, and the law of nations, before I proceeded to treat more fully of the principal subject of this section, municipal or civil law; that is, the rule by which particular districts, communities, or nations, are governed * * *. 'I call it municipal law, in compliance with common speech; for, though strictly that expression denotes the particular customs of one single municipium or free town, yet

it may with sufficient propriety be applied to any one state or nation, which is governed by the same laws and customs.' Municipal law, thus understood, is properly defined to be 'a rule of civil conduct prescribed by the supreme power in a state, commanding what is right and prohibiting what is wrong.'"

Also Ken't Commentaries, 12th edition, edited by O. W. Holmes, Jr., published in 1873, Part III, Page 507:

"Municipal law is a rule of civil conduct prescribed by the supreme power of a state. * * *. Municipal law is composed of written and unwritten, or of statute and common law. Statute law is the express will of the legislature, rendered authentic by certain prescribed forms and solemnities."

Also Bouvier's Law Dictionary, 11th ed. Phila. 1862.

"Municipal. Strictly, this word applies only to what belongs to a city. Among the Romand, cities were called municipia; these cities voluntarily joined the Roman republic in relation to their sovereignty only, retaining their laws, their liberties, and their magistrates, who were thence called municipal magistrates. With us this word has a more extensive meaning; for example, we call municipal law, not the law of a city only, but the law of the state. 1 Bl. Com. Municipal is used in contra-distinction to internationa; thus we say an offense against the law of nations is an international offense, but one committed against a particular state or separate community, is a municipal offense."

Also "Lectures Introductory to the Study of Law," George Sharswood, Philadelphia 1870:

"Natural jurisprudence includes in its survey topics which belong both to Municipal and International Law; that is, both the system of rules which governs a state internally, which we term Municipal Law, and that system by which it is regulated in the intercourse and relations with other states, which we call International Law."

Also "Introduction to American Law" by Professor Timothy Walker, 6th ed., Boston 1874, Page 47:

> "The grand design of this government would be to unite the people of the several states into one nation for national purposes only; and accordingly for all municipal purposes, each State would still retain its former government, divested, however, of the attributes of complete national sovereignty. * * * Suffice it to say, that each citizen would now owe obedience to two distinct governments, one national and the other municipal * * *."

To these citations might be added the third definition of the word "municipal" as given in Webster's International Dictionary, 2nd ed.:

> "3. Municipal. Of or pertaining to the internal or governmental affairs of a state, kingdom or nation—used chiefly in the phrase 'municipal law.'"

This view of the meaning of the statute was evidently presented to the Federal Courts in the case of U. S. vs. Forness. It seems to us that it should be accorded greater consideration than it received there. In the District Court Judge Knight was of the opinion that the words municipal laws "were intended to apply only to the State laws for the government and control of villages." If the term were intended to be so limited, it does not seem that the statute is appropriately worded. In their restricted sense "all the municipal laws of the State of New York" would include not only the Village Law but the Town Law, and the County Law, and the General Municipal Law, as well as laws relating to cities and districts of various sorts. Prior to 1874 a great many villages had been set up under special acts of the Legislature. The site of the Village of Salamanca was located within the County of Cattaraugus and also within the boundaries of the Township of Salamanca as well as being part of the Indian reservation.

In the Circuit Court of Appeals Judge Frank dismissed the contention as follows:

> "When, as in the statute, the 'laws' of a state of the Union are under discussion, there can be no intelligent

reference to its international or extra-mural laws for it has none under our Federal Constitution. Appellee's construction would, in effect, read the word 'municipal' out of the statute. 'Municipal laws' of such a state can have but one reference, i.e., the laws of its municipalities. The meaning is the same as when we speak of the 'Municipal Building' of the City of New York."

However, as is stated on Page 1413 of Volume 42, Corpus Juris, the adjective "municipal" is

> "more elastic in its meaning, than the word 'municipality' or even than the term 'municipal corporation,' variously defined as, belonging to a city, town or place having the right of local government, belonging to or affecting a particular state or separate community * * *. The term is sometimes used in contra-distinction to 'international' * * *. It has a broader meaning, a more extensive or extended meaning, and is in legal effect the same as public or governmental as distinguished from private."

See also cases there cited.

As to the statement that the State of New York can have no international or extra-mural laws, it would seem that in a sense a state may have and does have laws affected with an interest outside of the concerns of its own citizens and even outside its own boundaries. Then, too, the phrase is properly used in contra-distinction to laws of the Federal Government which define relations of the State and its citizens under the Constitution, with other States of the Union and their citizens. We have seen that in 1836 New York State had legislated to authorize Indian leases to railroads, but that the courts had failed to uphold them.

Ryan vs. Knorr, 19 Hun 540.

The statute under consideration, even in its narrower sense, would permit state legislation governing certain relations with the Indians in whom a separate sovereignty is recognized. The statute is legislation which, passed by the State legislature with the consent of Congress, would have an extra-mural significance.

It would seem to us that if the term "all municipal laws and regulations of said state" is to be limited narrowly to mean all of the Village Laws, or even all laws relating only to municipal corporations, the legislation would be inept and ineffectual to accomplish anything but an unworkable and confused result.

The Village Law of 1870 provided for police and police justices within villages. The police justices were vested with the same jurisdiction in civil and criminal matters as justices of the peace. The act further provided that the justices resident in a town where a village was located should have within the village the same civil and criminal jurisdiction which they might exercise outside the village. The question may be asked "What criminal law was it intended these officers should administer"? Were village police and police justices to administer the village ordinances and the Federal laws? Where would appeals from the decisions of the police justice and the justices of peace be heard? The Town Law gave criminal jurisdiction to Justices of the Peace. The County Law provided for Sheriffs. Federal Law is administered by United States Commissioners and the Federal Courts, and mandates are executed by United States Marshals. Many questions of this sort suggest themselves. It does not seem likely that the Congress could have intended to pass a statute designed to effect legal chaos in the Village or City of Salamanca.

On the other hand it seems that if the broader significance is to be given to the term "all municipal laws and regulations of said State," the statute is understandable and workable. Such meaning seems in harmony with the general purpose and intention of the act. Used in this sense the word "municipal" was most appropriate. If the word "municipal" were to be eliminated, the phrase would be appropriate no longer. It was not, as it seems, intended that all the laws and regulations of the state might extend over and be in force in said villages. If the statute had so read it would have been arguable that it authorized other laws, such as had been previously attempted, regulating relations with the Indians. It would have seemed to permit the State to invade a field intended to be reserved to the Federal government as guardian of the Indian tribes.

If the Congress intended, as we apprehend it did, to pass a statute establishing the villages of non-Indians on the reservation, permitting the laws of the State of New York to govern them so far as their own affairs were concerned, leaving matters purely Indian for regulation according to the institutions and customs of the Indians, but preserving to the Federal government its rights and duties towards its wards the Indians where matters might arise affecting their welfare, we can think of no simple phrase which could have been used so aptly as the phrase "municipal laws and regulations," understood in its broader sense.

The fact that in the year 1881 after this Act of Congress was passed and after the surveys had been filed and the leases made, the legislature of the State of New York passed an Act indicating an understanding that the general laws of the State of New York should apply to the villages in question, would seem to be an argument of some weight in favor of the interpretation we are adopting. The facts that for upwards of sixty years the State courts have assumed jurisdiction of criminal matters affecting while people in the City of Salamanca, and that during that period the Federal authorities have disclaimed and down to the present still disclaim jurisdiction, are also arguments that the interpretation suggested was intended by the Congress. As Judge Knight has pointed out, in the construction of a statute of this kind the administrative view is entitled to great weight. He cites U. S. vs. American Trucking Association, 310 U. S. 534.

Where a statute is susceptible of more than one interpretation, contemporaneous and long continued administrative interpretation of it is especially persuasive. See annotations 73 U. S. S. C. Law Ed. 322 and Voll. 84 Law. Ed. 28.

We conclude that the Act of Congress of February 19, 1875, permitted the extension of the penal laws of the State of New York to crimes committed by non-Indians within the City of Salamanca, and that said City is not Indian country within the meaning of Section 217, Chapter 7 of Title 25 of the U. S. Code. The Supreme Court of the State of New York had jurisdiction to try and convict the relator and he is

held by virtue of a judgment of a court of competent jurisdiction. An order should be entered dismissing the writ and remanding the relator to the custody of the Warden of Attica State Prison.

APPENDIX "D"

Opinion of the Appellate Division, Fourth Department

(268 A. D. 218)

CUNNINGHAM, P. J.:

The relator was indicated by a grand jury of Cattaraugus County for the crime of murder in the first degree. One of the counts of the indictment charged that the murder was committed by the defendant while he was in the act of committing a felony. It was upon this count that the defendant was found guilty by a jury after a trial in the Supreme Court of Cattaraugus County. The jury recommended life imprisonment and, thereafter on December 15, 1939 the defendant was sentenced to be confined in Attica State Prison for the term of his natural life.

The conviction of relator was appealed to this court and was affirmed. The question of jurisdiction was not raised upon the trial or upon the appeal to this court. After the sentence the relator applied to the United States District Court for a writ of habeas corpus. This was denied by Judge Knight, United States District Judge, upon the ground that such writ could not be allowed until relator had exhausted his remedy in the state courts and upon the further ground that the Supreme Court of the State of New York had jurisdiction to try and convict him. Upon appeal to the Circuit Court of Appeals, Judge Knight's decision was affirmed upon the ground that the relator was not entitled to a writ until it became apparent that the state courts would not or could not do justice. The question of the jurisdiction of the State Supreme Court was not passed upon. Application was then made to a state court—the County Court of Wyoming County—for a writ of habeas corpus, the relator claiming that the crime was com-

mitted on Indian lands; that the state courts did not have jurisdiction to try him for such crime and that his trial should have been had in a federal court. The appeal now pending before us was taken from the order of the Wyoming County Court which denied such application.

The relator is a white man and the murdered man was a white man.

It is conceded that the place where the crime is alleged to have been committed is in the City of Salamanca, which is within the original limits of the Allegany Indian Reservation.

The relator relies upon Section 217, Title 25, U. S. C., reading as follows:

> "Except as to crimes punishment of which is expressly provided for in this title, the general laws of the United States as to the punishment of crimes committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian Country."

The lands in the City of Salamanca are mostly occupied by white people, but the Indians still hold the title to them. However, the Indians have been permitted by act of Congress to lease the lands now included in the City of Salamanca to the people who now occupy them for a term of ninety-nine years, with the right of renewal given to each lessee. (City of Salamanca v. United States, 125 Fed. (2d) 928; Certiorari denied 316 U. S. 694). The Indians have parted with their right to use and occupy the lands in the City of Salamanca and have passed the control thereof to the lessees.

Lands which are used and occupied by white persons under a grant of the Indian owners are not, in our opinion, Indian lands within the meaning of the statute relating to Indian lands. The term "Indian Lands" applies only to lands owned by Indians and occupied and used by them. (United States v. Chavez, 290 U. S. 357.)

In the early days of this country the various Indian tribes were regarded as foreign nations, and regulations for their welfare and protection and for the protection of their property were made through treaties negotiated between

each tribe and the United States. In subsequent years the theory that each Indian tribe was a foreign nation was discarded and the Indians were regarded as wards of the United States, and protection to them and their property was given by acts of Congress and they became subject to the regulations contained in such acts.

For many years this state has held in decisions of its courts and in laws enacted by its Legislature that it had jurisdiction to try Indians for crimes committed against other Indians or their property whether on Indian lands or on other lands in the state. As late as July 1913, the Appellate Division of this department unanimously affirmed an order of the Supreme Court of Niagara County, holding that the Supreme Court of this state had jurisdiction to try an Indian for a crime committed upon the person of another Indian within the boundary of the reservation on which both lived. (People ex rel. Cusick v. Daly, 78 Misc. 657; affd. 158 App. Div. 892). However, this decision was reversed by the Court of Appeals which held that the power of the state must yield to the paramount authority of the federal government and that under the statutes of the United States the power to try the defendant in that case was vested in the federal courts. (People ex rel. Cusick v. Daly, 212 N. Y. 183.) This decision does not apply in the case at bar because the jurisdictional facts in the cited case and in this case are entirely different. In the cited case the crime was committed upon an Indian reservation the lands of which were owned by an Indian tribe and were used and occupied by Indians. Furthermore, the crime was committed by an Indian upon the person of another Indian, both of whom were wards of the United States. In the case under consideration the crime was not committed upon lands used and occupied by Indians and was committed by a white man upon the person of another white man.

We believe that the section of the United States Statutes relied upon by the relator does not apply to a crime committed by one white person against another. This statute was passed to provide for the punishment of crimes committed by Indians on Indian lands and applies to crimes committed by white persons on Indian lands against In-

dians on their property, but does not apply to a crime committed by a white person against another white person even though committed on Indian lands. The federal courts do not have jurisdiction to try white citizens of the various states for crimes not committed against the federal government or against the wards of the federal government. This is so even though the crime is committed on Indian lands. (United States v. McBratney, 104 U. S. 621; United States v. Bailey, 1 McLean 234.)

The order appealed from should be affirmed, without costs.

APPENDIX "E"

Opinion of the Court of Appeals, State of New York

415—New York Opinion—(Vol. 294)—3228

THE PEOPLE OF THE STATE OF NEW YORK EX REL. DONALD A. J. RAY, *Appellant*,

against

WALTER B. MARTIN, as Warden of Attica State Prison, *Respondent*. (294 N. Y. 415) (Unpublished)

Decided March 1, 1945

APPEAL, by permission of the Court of Appeals, from an order of the Appellate Division of the Supreme Court in the fourth judicial department, entered September 27, 1944, which unanimously affirmed an order of the Wyoming County Court (Conable, J., opinion 181 Misc. 925) dismissing a writ of habeas corpus and remanding relator to the custody of respondent, as warden of Attica State Prison.

Thomas J. McKenna, James B. McKenna and Benjamin Galperin for appellant.

Nathaniel L. Goldstein, Attorney-General (Henry S. Manley, Orrin G. Judd and Wortley B. Paul of counsel), for respondent.

Beverly S. Galloway, Assistant District Attorney, Cattaraugus County.

ESMOND, *J.*:

Relator is serving, in a New York State Prison, a life ntence imposed on him by the Supreme Court of the State New York on December 15, 1939, for the commission, at e City of Salamanca, in Cattaraugus County, New York, a "felony murder" (Penal Law, Sec. 1044, Subd. 2, Sec. 45-a). Almost the whole of the City of Salamanca, includg the scene of the killing, is within the bounds of the Algany Reservation of the Seneca Nation of Indians. Relator is not an Indian, nor was his victim, one Paul Balsiger. this habeas corpus proceeding relator asserts that the upreme Court of this State was without any jurisdiction of s offense, committed as it was on an Indian reservation. o such challenge to the jurisdiction was made during lator's trial or on his appeal to the Appellate Division from e judgment of conviction, which appeal resulted in an firmance by that court (259 App. Div. 1065), or on a subequent motion, denied by a Judge of this court, for leave appeal to this Court. We hold, nonetheless, that the alged jurisdictional question may properly be raised by ese habeas corpus proceedings. (See People ex rel. Carr Martin, 286 N. Y. 27, 31, 32.) Special Term and the ppellate Division, fourth department, both wrote opinns (181 Misc. 925 and 268 App. Div. 218) in dismissing the rit. We granted leave so that we might, if possible, set rest any doubts as to whether the Penal Laws of this tate apply to crimes committed in the city of Salamanca. he respective counsel have furnished us with extensive eviews of the writings on the very large subject of the risdiction of tribal, Federal and State courts over Indian servations in the United States. We content ourselves ith a statement of the bases for our conclusion that relator as properly indicted, tried and punished in the Supreme ourt, despite the undoubted fact that the crime was comitted on lands which form part of an Indian reservation. general, our reasons for that conclusion are these: that ere is no basis in any treaty, Constitution or statute for an sertion by the Federal government of exclusive jurisdicn over crimes committed by non-Indians against nondians on this reservation, that such jurisdiction has his-

torically, by common consent and for sound legal reasons been assumed to exist, by the Federal and State courts in New York and elsewhere, that this is peculiarly so as to the reservations of the "Six Nations" in New York State, and, finally, that there is a Federal statute making applicable to the city of Salamanca the general laws of the State of New York.

The Allegany reservation of the Seneca Indians is wholly within New York State, has an area of about forty-two square miles and extends along both sides of the Allegany River, north from the Pennsylvania border. It is a part of the much more extensive lands occupied by the Seneca nation before the American Revolution. Before our Federal Constitution was adopted, those Seneca lands were within the bounds of the State of New York. The Allegany reservation was, accordingly, not created by the Federal government out of United States government lands within the State, and was never at any time territory of the United States. (Seneca v. Christie, 126 N. Y. 122, 136, affd. 162 U. S. 283.) During colonial days there had been a protracted quarrel between New York and Massachusetts over a large territory (several million acres) including much of present-day western New York, each colony claiming that its royal charter gave it sovereignty and jurisdiction over the disputed tract. In 1786, after the Declaration of Independence but before the adoption of the Federal Constitution, a compact was entered into between the sovereign States of Massachusetts and New York by the terms of which compact New York was recognized as having sovereignty and jurisdiction over the lands and Massachusetts was recognized as the owner of the "right of preemption" of the lands themselves, including the right to extinguish such title as the Indians had. This compact, subsequently ratified by the Congress of the United States, authorized Massachusetts to grant and convey the right of pre-emption, as to any part of the lands involved, "to any person or persons, who by virtue of such grant, shall have good right to extinguish by purchase the claims of the native Indians * * *". Massachusetts in 1791 conveyed its title, subject to the Indian claims, to Robert Morris, who later conveyed it to the Hoiland Land Company, Morris agreeing to ex-

tinguish the Indian rights at his own expense. He did so in 1797 when at a great council of the Senecas held at Geneva, New York, he received from the Seneca Nation a conveyance of all the lands purchased by him from the State of Massachusetts, excepting certain Indian reservations, including the Allegany reservation with which we are here concerned. The council was held and the conveyance made with the approval of the government of the United States, as represented by its Commissioner. (See discussions of these transactions in Seneca v. Christie, supra, and Jemison v. Bell, 186 N. Y. 493, 497.)

Previously to the Geneva Council, and in 1794, there had been entered into at Kon-on-daigua (Canandaigua, N. Y.) a treaty between the United States of America and "the Tribes of Indians called the Six Nations" (including the Seneca Nation). By it "peace and friendship" were to be "firmly established" forever, between the United States and the Six Nations. The treaty contains a description by metes and bounds of the lands of the Seneca nation, with an acknowledgment by the United States that the described lands were the property of that nation, and a promise by our government that the possession thereof by the Senecas would never be disturbed. The Senecas, on their part, covenanted that they would never claim any other lands within the boundaries of the United States. By Article V the Senecas ceded to the United States the right to build a wagon road through part of their lands (not the Allegany reservation) and the right of free passage through all the Seneca lands. Article VII of that Treaty of 1794 is one of relator's main reliances. By that article it was stipulated that, "lest the firm peace and friendship now established should be interrupted by the misconduct of individuals, * * * for injuries done by individuals on either side, no private revenge or retaliation shall take place, but, instead thereof, complaint shall be made by the party injured to the other". If the depredation was by Indians, the complaint was to be made by the President, or a superintendent by him appointed, to the principal chiefs of the Six Nations or any of them; if the "private injury" was by whites, then the complaint would go from the Indian nation to the

President, or his superintendent. Upon the entry of any such complaint, says article VII, "such prudent measures shall then be pursued as shall be necessary to preserve our peace and friendship unbroken until the legislature (or great council) of the United States shall make equitable provision for the purpose". Relator treats that last-quoted sentence as "provision for future federal legislation which would cover the crime in question when committed within the Allegany reservation". He says that the language "expressly excluded State laws from application to this reservation". We cannot agree that it had any such meaning or effect, or that it referred at all to the question of what system of internal law should thereafter operate within the tribal lands. The treaty was, in substance as well as form, a true treaty, made between the United States of America and the quasi-sovereign Six Nations. It was made not to set off lands to the Indians or to provide for their government, but as a treaty of peace to put an end to a state of war and guard against its recurrence. For this purpose, border raids or other incursions were to be treated as "international incidents", and diplomatic representations thereupon were to be made by the aggrieved signatory to the other. The Treaty of 1794 was one of a long series of actual treaties made between the United States and Indian tribes until the practice was abolished in 1871. (See Seneca v. Christie, supra; Turner v. American Baptist etc., 5 McLean 344, 349; United States v. Whiskey, 93 U. S. 188.) It did not create any Indian reservation but confirmed the Senecas' aboriginal right of possession. (See United States v. Santa Fe, 314 U. S. 339.) Nothing in the language of the pact, the circumstances giving rise to it, or the history of proceedings under it, furnish reason for holding that it had anything to do with the future domestic government of the reservation or that the reference to "the legislature or great council of the United States" in itself conferred on Congress any power of any sort to legislate as to such matters. If such a meaning had been intended, appropriate language was available. (See, for instance, treaty provision quoted in United States v. 43 Gallons whiskey, supra, 93 U. S. at p. 193.)

Of course, Congress had, from other sources, jurisdiction over the Indians and their lands and their affairs. By Federal Constitution provision (art. 1, Sec. 8) and perhaps ex necessitate (See Board v. Saber, 318 U. S. 705, 715), the Indian tribes have always been to some degree dependents of the government of the United States and their members have been wards of that government, receiving its care and protection. (United States v. Kagama, 118 U. S. 375; United States v. Sandoval, 231 U. S. 28; United States v. Klamath, 304 U. S. 119.) The power of Congress over the Indians and their tribal affairs and domains is paramount and of a most sweeping character. (Worcester v. Georgia, 31 U. S. 515.) The courts of this State, as well as the Federal courts, have consistently recognized that this paramount power in Congress is applicable to the affairs of the Six Nations within New York State. (People ex rel. Cusick v. Daly, 212 N. Y. 183, 196; Mulkins v. Snow, 232 N. Y. 47, 51; United States ex rel. Kennedy v. Tyler, 241 U. S. 556, affg. 294 F. 111.) But, while the tribal Indians, being wards of the national government, are not generally amenable to State laws nevertheless the lands in any State occupied by Indians is still part of the State unless expressly excluded therefrom. (See Thomas v. Gay, 169 U. S. 264, 274, 275; Utah v. Fisher, 116 U. S. 28.) The exclusive control of the Federal government over Indians extends only so far as is required by the pupilage of the wards and has to do only with government and protection of the Indians themselves. (Utah v. Fisher, supra.) Congress may exercise that jurisdiction by legislating concerning crimes committed by Indians or against Indians within a reservation. (Donnelly v. United States, 228 U. S. 243.) But that jurisdiction over the Indians has nothing at all to do with the transactions of white men among themselves not affecting the persons or property of Indians, on or off a reservation. Accordingly, it has been held in many State and Federal decisions, and apparently never until now questioned, that to oust the criminal courts of a State from jurisdiction over crimes committed by a non-Indian against a non-Indian, more must be shown than the single fact that the crime was committed on an Indian reservation. (See Donnelly v. United States, supra; United States v. McBrat-

ney, 104 U. S. 621; State v. Monroe, 83 Mont. 556; People v. Pratt, 26 Cal. App. 2d 618; State v. Lindsay, 133 Wash. 140; State v. Adams, 213 N. C. 243; United States v. Partelle, 48 F. 670.) To allocate jurisdiction over such crimes to the Federal courts, there must be shown some treaty or act specifically so commanding. (United States v. Partelle, supra; see Draper v. United States, 164 U. S. 420.) The reason is simply this: the original thirteen states and those later admitted into the Union on an equal basis with the original thirteen, have general criminal jurisdiction over all non-Indian persons within the State limits, including Indian reservations. (United States v. McBratney, supra.) Even as to Indians, the national government's exclusive jurisdiction of the crimes over which it has by statute assumed jurisdiction, applies only to Indians living "in the tribal relations" (Peters' case, 2 Johns. Cases 344; People ex rel. Cusick v. Daly, supra, 212 N. Y. at p. 193.) It is a jurisdiction stemming from the power to legislate in "Indian affairs" and not embracing all occurrences on Indian lands. The case of the New York Indians (5 Wall. 761), is not to the contrary; it forbade State taxation of tribal lands on this reservation because such taxation would be "offensive to the tribal relations" (p. 771). Cases like Pickett v. United States (216 U. S. 456), merely show that in the later-admitted states the Federal government may, and sometimes did, in granting statehood, or in creating Indian reservations out of lands owned by the United States, expressly reserve exclusive jurisdiction on such Indian lands, as to all justiciable matters. No such situation has ever existed in New York State. In 1834, Supreme Court Justice McLean held at Circuit (United States v. Bailey, 1 McLean, 234) that a United States Court could not try a white man for killing another white man on a Cherokee reservation. "The State of New York" he noted (p. 239) "for many years has punished its citizens for crimes committed in the Indian territory within its limits".

Assuming that Congress could by statute take or keep for itself exclusive legislative control over the crime of murder, by whomever perpetrated, in the Allegany reservation, where is there any such statute? Relator relies on United States Code, Title 18, Sections 451 and 452 and United

States Code, Title 25, Section 217. The first two of those Sections (U. S. Code, Title 18, Sections 451, 452), so far as important here, define, and provide for the punishment of murders "committed within or on any lands • • • under the exclusive jurisdiction (of the United States)." We find no ground whatever for a holding that the Allegany reservation was ever "under the exclusive jurisdiction" of our Federal government. Ultimately, relator's opposing argument stands or falls on his own construction of the Treaty of 1794, a construction which we have rejected in preceding paragraphs of this opinion and which has never in practice been accepted by any branch of either the New York State or the United States Government. In the other statute (U. S. Code, Title 25, Section 217) urged upon us by relator as empowering the United States Courts alone to deal with murders done on reservations, the language is that, with exceptions not here relevant, "the general laws of the United States as to the punishment of crimes committed in any place within the sole and exclusive jurisdiction of the United States • • • shall extend to the Indian country." Relator says that the Allegany reservation, including the City of Salamanca, is "Indian country." Without passing squarely on the point, we conclude that there is some basis for it. "Indian Country," archaic as the phrase now sounds, still seems to comprehend any unceded land, such as a reservation, occupied by an Indian tribe—any place to which the Indian title has not been extinguished. (Donnelly v. United States, supra; Bates v. Clark, 95 U. S. 204; ex parte Crow Dog, 109 U. S. 556; Pronovost v. United States, 232 U. S. 487; United States v. Pelican, 232 U. S. 442; United States v. Chavez, 290 U. S. 357.) We may doubt whether the phrase "Indian country" ever did have any meaning in connection with the Six Nations and more doubt as to whether it could, in any event, be reasonably applied to Salamanca, in which live only a handful of Indians and which is, by State statute and Act of Congress (as we shall see hereafter) a white man's city. Only by main force, we think, could the term be applied to a city all of the lands of which have, by corporate action of the Seneca Nation and with the express consent of Congress (see later discussion of

the Act of 1875) been leased to white persons. "A country without Indians could hardly be considered an Indian country" (United States v. Richard, 1 Ariz. 31, 39, 40). But, whether or not Salamanca is still "Indian country" in some sense or other, we state with confidence that the particular statutes cited by relator have never been considered as giving the Federal courts absolutely exclusive jurisdiction of crimes, whether committed by Indians or Whites, on the New York State reservations. In Benson v. United States (44 F. 178), the Circuit Court, reversing a conviction, held that Benson, operating a tavern in Salamanca, was not guilty of introducing intoxicating liquors into the "Indian country" (see U. S. Code, Title 25, Section 241).

In Mullins v. Snow (232 N. Y. 47, 50, 51), this court recognized, but did not define the limits of, the power of the State to legislate even in some respects "for the tribal Indians living on reservations" and referred to power of Congress as being one "to legislate for them (the Indians) within their reservation." The Supreme Court, in State v. Dibble (62 U. S. 149), referring to a New York State statute relating to intrusions of white men on Indian lands, and speaking specifically of the Tonawanda reservation of the Senecas, said: "Notwithstanding the peculiar relation which these Indians hold to the Government of the United States, the State of New York had the power of a sovereign over their persons and property, so far as was necessary to preserve the peace of the commonwealth, and protect these feeble and helpless bands from imposition and intrusion. The power of a state to make such regulations to preserve the peace of the community is absolute, and has never been surrendered." It would take too long to list the various assumptions by New York State of various kinds of control over the Indians themselves, and the ratifications and recognitions thereof by the Federal government and courts. (See United States ex rel. Kennedy v. Tyler, supra.) Justice Andrews, later of this court, wrote in a memorable opinion (George v. Pierce, 85 Misc. 105, 122): "Our Courts have assumed criminal jurisdiction over them (the Six Nations). Our legislature has asserted their right so to do. And this jurisdiction has been mentioned by the Supreme Court of

the United States without disapproval." Justice Andrews, recalling that the Indians of the Six Nations were in fact wards of this State at the time it became an independent sovereignty on the adoption of the Declaration of Independence and that among other sovereign rights of the State, as successor to the British Crown before the adoption of the Constitution, was its protectorate over the Indian tribes, pointed out that New York never transferred to the general government any rights over the Indians except as expressed in the Federal Constitution, and that, in a broad sense, the Indians of the Six Nations are, unlike the western Indians "wards of the State—not of the United States" (85 Misc. at p. 120). From all of this, it is plain enough, we think, that the doubts and vagueness that becloud the general subject of law on Indian reservations, have nothing whatever to do with criminal prosecutions like that of this relator for the killing of Paul Balsiger, in Salamanca, New York, in 1939.

In an earlier paragraph of this opinion we stated, as one of the bases for our conclusion herein, that there is a Federal statute which makes applicable to the city of Salamanca the general laws of the State of New York. That enactment (U. S. Code, Title 18, Stat. 330 Ch. 90) was passed by Congress in 1875. It provides as to Salamanca (then a village) and several other named villages in the Allegany reservation that "all municipal laws and regulations of said State (New York) may extend over and be in force within said villages." From the historical background of the statute, the setting of the quoted language therein, and from subsequent authoritative interpretation given it by the New York Legislature, it is plain to us that "all municipal laws and regulations of said State" means all the internal, domestic laws of the State. Our arrival at that conclusion has not been a hasty or incautious one, conscious as we are that the United States Circuit Court of Appeals has, in *United States* v. *Forness* (125 F. 2d 928, cert. den. 316 U. S. 694) interpreted somewhat differently the phrase of the statute: "municipal laws." As always, we give due and great respect to the construction by a Federal court of a Federal statute, but we are not strictly bound in such matters by any but United States Supreme Court decisions.

In this instance we feel constrained to make our own independent decision. We are called upon in this case to decide whether or not there exists any legal basis for the undisputed enforcement in Salamanca, for the past sixty-five years or more, of the general penal laws of this State. The Circuit Court of Appeals did not have any such broad question before it in the Forness case. The Forness case was brought on behalf of the Seneca Nation, in ejectment, to oust one of the white lessees for nonpayment of the rent due from him to the Nation. One of the issues before the Circuit Court was as to the applicability to such a lawsuit between the tribe and a white individual, of sections 997-999 of the New York Civil Practice Act, particularly section 999, which permits payment into court, at any time before judgment, of the rent due, with costs; and requires a dismissal of the action, on such payments being made. Whatever the words "municipal law" may mean in the case we have before us on this appeal, or in other connections, it is entirely clear that Congress, validating the Indian leases and reserving a measure of Federal control over the leased lands, could not have intended by the 1875 statute to make applicable to controversies over those leases the New York laws as to remedies of the lessor on a default by the lessee. As the Special Term said in the present case, interpreting section 5 of the 1875 statute: "Potential conflicts between Indian lessors and the lessees involving forfeiture of leases and the like, are since the Indians have a degree of sovereignty and are the wards of the Federal government, extra-mural matters, so far as the laws of the United States are concerned. Such matters are subject to the laws of the United States."

We agree with the Circuit Court of Appeals that "municipal laws" has two meanings. Broadly and classically it means the laws pertaining to the internal government of a State or nation. (See 1 Blackstone Comm. 44; People v. Tiphaine, 3 Parker Cr. Rep. 244.) In its more modern and narrower connotation it means those laws which pertain to towns, cities and villages and their local governments. Intrinsically the words may have either of those meanings. But historical research, we believe, establishes that the broader and older intendment must have been the one used

by Congress. The statute was passed because of a pressing difficulty. Long before 1875, Salamanca and several other villages of white men had sprung up on the Allegany reservation, and the white settlers and several railroad companies who built their lines through the reservation lands, had made their improvements on the faith of land leases from the Indians. Although confirmed by act of the New York Legislature of this State passed and transmitted to Congress a resolution (L. 1875, p. 819) requesting the latter body to pass some law "for the relief of said white settlers." Soon thereafter, Congress on February 19, 1875, enacted the law we are here construing. After providing for appropriate validation of the leases, the statute in its last paragraph, says this: "That all laws of the State of New York now in force concerning the laying out, altering, discontinuing, and repairing highways and bridges shall be in force within said villages (including Salamanca), and may, with the consent of said Seneca Nation in council, extend to, and be in force beyond, said villages in said reservations, or in either of them; and all municipal laws and regulations of said State may extend over and be in force within said villages: Provided, nevertheless, that nothing in this section shall be construed to authorize the taxation of any Indian, or the property of any Indian not a citizen of the United States." The best possible clue to the meaning of "all municipal laws and regulations of the State" as used in the Act is found in the action taken by our State Legislature, after Congress had acceded to its request by passing the statute above described. Apparently the new leases authorized by the Federal Act were entered into in 1880. In 1881, our Legislature, undoubtedly as a sequel to that passage of the Federal Act, put on our statute books chapter 881 of the Laws of that year, now section 71 of our State Indian Law, wherein, changing the word "municipal" to "general" it directed that "all the general laws of the state are extended over and apply to the same (the villages of Salamanca et al.)." From that day until the Forness case (supra) was decided, no one has ever expressed a doubt, as far as any record shows, that the word "municipal" as used by Congress and the word "general," as used by our Legislature, meant exactly the same thing, and that both

words included and envisaged the whole State system of laws for the internal government of the residents of the village, and not merely minor local ordinances, or State laws dealing with the details of village government. Such a use of the phrase "municipal law" was technically and scientifically correct for the result intended. The Act of 1875 was an act of cession in the sense that it ceded to the State such governmental jurisdiction as the national government or the Seneca Nation might otherwise have or been thought to have, over the white villages. (Incidentally such cessions or relinquishments of Federal control over the government of Indian lands are not unusual and are considered legal even in contravention of treaties. (See Lone Wolf v. Hitchcock, 187 U. S. 553, 566, 567; Tiger v. Western, 221 U. S. 286, 315; Shoshone v. United States, 299 U. S. 476, 497).

To describe the body of law which was to be operative in such ceded territory, the phrase "municipal laws" was appropriate and conventional. In Chicago v. Pacific Railroad Co. (1885) (114 U. S. 542), the Supreme Court was called upon to decide whether a State statute remained in effect on the Fort Leavenworth Military Reservation after the State of Kansas had ceded to the United States exclusive jurisdiction therein. A quotation from that opinion (p. 546) will show better than extended argument how apt and necessary was the phrase "municipal laws" to convey the idea that in the Village of Salamanca, private property and private conduct were to be regulated by the laws of the State of New York: "It is a general rule of public law, recognized and acted upon by the United States, that whenever political jurisdiction and legislative power over any territory are transferred from one nation or sovereign to another, the municipal laws of the country, that is, laws which are intended for the protection of private rights, continue in force until abrogated or changed by the new government or sovereign." (For similar uses of the word "municipal" see Halleck, Int. Law (1st ed., 1861), ch. 33, Sec. 14; Vilas v. Manila, 220 U. S. 345, 347; Murray v. Gerrick, 291 U. S. 315, 319.) Thus we see that the clause "all municipal laws and regulations of said State may extend over and be in force within said villages" was a short but scientifically complete way of eliminating any doubt as to whether, after the Act's

passage, the laws affecting private rights of the residents of the villages would be those of the United States, or the Seneca Indians, or the State of New York. The Circuit Court of Appeals thought that giving "municipal laws" its more ancient meaning, i.e., of general State laws as opposed to international laws, would result in an absurdity since, said that court, the State of New York had no international relations or international law. But the villages and their villagers did have and continued to have a relationship, based on their leases, with the still quasi-independent Seneca Nation.

Relator argues that the specific reference in the above quoted 1875 Congressional statute to state laws concerning highways and bridges shows that the later-used term "municipal laws" had no application to State laws. On the contrary, we think that the statute itself shows why the highway and bridge laws were separately mentioned, i.e., because the Seneca nation in council was to have the right to extend those laws to the whole reservation.

The order should be affirmed.

Lehman, Ch. J., Loughran, Lewis, Conway, Thacher and Dye, JJ., concur.

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